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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 BENJAMIN M.,

11 Plaintiff,

12 v.

13 COMMISSIONER OF SOCIAL  
14 SECURITY,

15 Defendant.

CASE NO. 2:19-CV-1273-DWC

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

16 Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of  
17 Defendant's denial of Plaintiff's applications for supplemental security income ("SSI"). Pursuant  
18 to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties  
19 have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 2.

20 After considering the record, the Court concludes that a 2018 medical opinion from  
21 examining psychologist David Mashburn, M.D., unavailable to the Administrative Law Judge  
22 ("ALJ") at the time he rendered his decision, indicates that Plaintiff's mental health impairments  
23 may have persisted and worsened between 2016 and 2018. This new evidence impacts the ALJ's  
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1 evaluation of Dr. Mashburn's earlier opinion, and prevents the ALJ's decision from being  
2 supported by substantial evidence.

3 Dr. Mashburn's 2018 opinion, if credited, would likely result in additional residual  
4 functional capacity ("RFC") limitations and may impact the ultimate disability determination.

5 Accordingly, this matter is reversed and remanded pursuant to sentence four of 42 U.S.C.  
6 § 405(g) to the Social Security Commissioner ("Commissioner") for further proceedings  
7 consistent with this Order.

### 8 FACTUAL AND PROCEDURAL HISTORY

9 On February 19, 2016, Plaintiff protectively filed an application for supplemental  
10 security income. *See* Dkt. 8, Administrative Record ("AR") 17, 182-90. His application was  
11 denied upon initial administrative review and on reconsideration. AR 17, 96-99, 105-15. A  
12 hearing was held before ALJ C. Howard Prinsloo on January 31, 2018. AR 40-71. In a decision  
13 dated September 21, 2018, ALJ Prinsloo found that Plaintiff was not disabled. AR 14-26. The  
14 Social Security Appeals Council denied Plaintiff's request for review on July 10, 2019. AR 1-7.  
15 The ALJ's decision of September 21, 2018 is the final decision of the Commissioner subject to  
16 judicial review. *See* 20 C.F.R. § 416.1481.

17 In Plaintiff's Opening Brief, Plaintiff maintains the ALJ erred by: (1) failing to properly  
18 assess the medical opinion evidence; (2) failing to provide germane reasons for discounting an  
19 opinion from Robin Lipsker, LICSW; (3) failing to consider Plaintiff's autism spectrum disorder  
20 and panic disorder at step two of the sequential evaluation; and (4) failing to provide clear and  
21 convincing reasons for discounting Plaintiff's symptom testimony. Dkt. 10, pp. 3-17.

22 Plaintiff also contends that a June 2018 opinion from David Mashburn, Ph.D. that was  
23 unavailable to the ALJ undermines the ALJ's finding that Plaintiff was not disabled. *Id.* at 18.

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## DISCUSSION

### A. Dr. Brenda K. Havellana

Dr. Havellana further opined that Plaintiff's reported difficulties with PTSD and panic attacks could pose a moderate to marked vocational barrier depending on the environment. *Id.* Dr. Havellana stated that Plaintiff's anxiety "could certainly" impact his absenteeism and tardiness rates in a vocational setting. *Id.* Dr. Havellana stated that Plaintiff would likely perform best in more solitary vocational settings. *Id.*

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1 contained in her opinion by restricting Plaintiff to brief, superficial interactions with the public  
2 and coworkers. AR 24.

3 Plaintiff contends that the ALJ erred by not incorporating Dr. Havellana's opinion  
4 concerning Plaintiff's ability to perform full time work, his likely absenteeism and tardiness, and  
5 his need for a solitary work setting into the RFC. Dkt. 10, p. 4.

6 The ALJ is responsible for translating and incorporating clinical findings into a succinct  
7 RFC. *Rounds v. Comm'r Soc. Sec. Admin.*, 807 F.3d 996, 1006 (9th Cir. 2015). To the extent that  
8 an ALJ accepts a physician's opinion, he or she must incorporate the limitations contained in that  
9 opinion into the RFC. *See Magallanes v. Bowen*, 881 F.2d 747, 756 (9th Cir.1989).

10 Here, the ALJ gave great weight to the entirety of Dr. Havellana's opinion, did not  
11 express any reservations about the meaning of the limitations contained in the opinion, and found  
12 that an RFC restriction to brief, superficial interactions with the public and coworkers was  
13 sufficient to accommodate the limitations assessed by Dr. Havellana. AR 24.

14 The dispositive question here is whether the limitations contained in the RFC are  
15 sufficient to accommodate all the limitations assessed by Dr. Havellana, and whether these  
16 limitations were intended to be recommendations or imperatives. The ALJ does not need to  
17 accommodate a physician's non-imperative recommendation when formulating the RFC. *See*  
18 *Carmickle v. Comm'r, Soc. Sec. Admin*, 533 F.3d 1155, 1165 (9th Cir. 2008) (the ALJ does not  
19 err in rejecting a physician's proposal when it is framed as a recommendation rather than an  
20 imperative); *Valentine v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 685, 691-92 (9th Cir. 2009) (an  
21 ALJ does not err by excluding recommendations from the residual functional capacity finding).

22 Dr. Havellana's opinion concerning Plaintiff's mental limitations contains numerous  
23 conditional and equivocal statements. She stated that Plaintiff "would likely" find consistent and  
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1 successful engagement in a full-time vocational setting moderately to markedly challenging  
2 “depending on the environment.” AR 334. Dr. Havellana stated that Plaintiff’s post-traumatic  
3 stress and panic attacks “could” impose a moderate to marked vocational barrier “depending on  
4 the environment”, his anxiety “could certainly” impact his absenteeism and tardiness, and he  
5 would “likely” perform best in “more solitary vocational settings.” *Id.* As Dr. Havellana’s  
6 opinion contains a significant degree of ambiguity concerning Plaintiff’s precise mental  
7 limitations, and since the ALJ did not express any reservations about the meaning of the  
8 limitations contained in the opinion or otherwise address the multiple conditional statements, the  
9 Court cannot determine whether the ALJ erred when incorporating the limitations assessed by  
10 Dr. Havellana into the RFC and is supported by substantial evidence.

11 **B. Dr. Mashburn**

12 Dr. Mashburn examined Plaintiff for the Washington Department of Social and Health  
13 Services (“DSHS”) on May 16, 2016. AR 335-41. Dr. Mashburn’s evaluation consisted of a  
14 clinical interview, a mental status examination, and psychological testing. Based on this  
15 evaluation, Dr. Mashburn assessed Plaintiff as having a range of moderate and marked mental  
16 limitations, and stated that Plaintiff’s overall degree of impairment was marked. AR 337.

17 The ALJ assigned “little weight” to Dr. Mashburn’s opinion, reasoning that: (1) Dr.  
18 Mashburn stated that Plaintiff’s limitations would only last for between 9 and 12 months; (2)  
19 Plaintiff was not taking medication or receiving mental health treatment when Dr. Mashburn  
20 rendered his opinion; (3) Dr. Mashburn’s opinion is inconsistent with Dr. Havellana’s opinion  
21 from the same day; (4) Dr. Mashburn’s opinion is inconsistent with Plaintiff’s self-reported  
22 activities of daily living; (5) Dr. Mashburn’s opinion is inconsistent with the results of his own  
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1 mental status examination; and (6) Dr. Mashburn appeared to rely solely on Plaintiff's self-  
2 reported symptoms when formulating his opinion. AR 24.

3 The record contains an additional June 5, 2018 opinion from Dr. Mashburn submitted by  
4 Plaintiff after the ALJ issued his decision. AR 32-39. The Appeals Council denied review of  
5 Plaintiff's claim and opted not to exhibit this evidence, reasoning that it did not show a  
6 reasonable probability that it would change the outcome of the ALJ's decision. AR 2.

7 This Court must consider this additional material in determining whether the ALJ's  
8 decision is supported by substantial evidence. *See Brewes v. Commissioner of Social Security*,  
9 682 F.3d 1157, 1160 (9th Cir. 2012) (when a claimant submits evidence for the first time to the  
10 Appeals Council, which considers that evidence in denying review of the ALJ's decision, the  
11 new evidence is part of the administrative which the district court must consider in determining  
12 whether the Commissioner's decision is supported by substantial evidence).

13 In Dr. Mashburn's new opinion, he assessed Plaintiff as having additional marked mental  
14 limitations in understanding, remembering, and persisting in tasks by following detailed  
15 instructions, adapting to changes in a routine work setting, making simple work-related  
16 decisions, and setting realistic goals and planning independently. AR 34.

17 Dr. Mashburn's new opinion indicates that Plaintiff's condition not only persisted after  
18 the 9 to 12 months indicated in his May 2016 opinion, but may have worsened after a period of  
19 mental health treatment. Dr. Mashburn's opinion is inconsistent with the ALJ's RFC, and  
20 undermines many of the ALJ's reasons for discounting Dr. Mashburn's May 2016 opinion.  
21 Accordingly, the Court cannot determine whether the ALJ's evaluation of Dr. Mashburn's May  
22 2016 opinion is supported by substantial evidence.

1       **II.     Other Issues**

2       Plaintiff maintains that the ALJ erred by not providing germane reasons for rejecting an  
3 opinion from Robin Lipsker, LICSW, at step two of the sequential evaluation, and in discounting  
4 his subjective symptom allegations. Dkt. 10, pp. 5-7, 12-17. Because Plaintiff will be able to  
5 present new evidence and testimony on remand, and because the ALJ's reconsideration of the  
6 medical evidence may impact his assessment of Ms. Lipsker's opinion, Plaintiff's severe  
7 impairments at step two, and Plaintiff's symptom testimony, the ALJ shall instead reconsider this  
8 evidence as necessary on remand.

9       **III.    Remedy**

10       The Court may remand a case "either for additional evidence and findings or to award  
11 benefits." *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1992). Generally, when the Court  
12 reverses an ALJ's decision, "the proper course, except in rare circumstances, is to remand to the  
13 agency for additional investigation or explanation." *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th  
14 Cir. 2004) (citations omitted). However, the Ninth Circuit created a "test for determining when  
15 evidence should be credited and an immediate award of benefits directed[.]" *Harman v. Apfel*,  
16 211 F.3d 1172, 1178 (9th Cir. 2000). Specifically, benefits should be awarded where:

17           (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the  
18           claimant's] evidence, (2) there are no outstanding issues that must be resolved  
19           before a determination of disability can be made, and (3) it is clear from the  
              record that the ALJ would be required to find the claimant disabled were such  
              evidence credited.

20       *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir.  
21 2002).

22       No such circumstances present themselves here, and the record is unclear as to whether  
23 Plaintiff would be found disabled even if the additional evidence not considered by the ALJ at  
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1 the hearing level was credited as true. Accordingly, remand for further administrative  
2 proceedings is the appropriate remedy.

3 CONCLUSION

4 Based on the foregoing reasons, the Court hereby finds the ALJ improperly concluded  
5 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is reversed and  
6 this matter is remanded for further administrative proceedings in accordance with the findings  
7 contained herein.

8 Dated this 13th day of April, 2020.

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11 David W. Christel  
12 United States Magistrate Judge  
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